BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.12.2023

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THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No.29395 of 2023
and
W.M.P(MD)Nos.25362 & 25363 of 2023

M/s.Kirubha Exports,
Represented by its Proprietrix,
V.T.Kirubha w/o.A.Vimal Kumar,
No.14/159, Thalakkanvilai,
Mullanganavilai,
Kaniyakumari District. ... Petitioner

Vs.

1.The Reserve Bank of India,
Department of Banking Regulation,
13th Floor, Central Office Building,
Mumbai – 400 0001.

2.The General Manager,
Credit Audit Monetary Department,
Tamilnad Mercantile Bank Limited,
Head Office, 1st Floor,
No.57, V.E.Road, Thoothukudi.

3.The Assistant General Manager,
Credit Audit Monetary Department,
Tamilnad Mercantile Bank Limited,
Head Office, 1st Floor, No.57, V.E.Road,
Thoothukudi.

4.The Branch Head,
Tamilnad Mercantile Bank Limited,
Thalakkulam Branch,
Monday Market,
Kaniyakumari District – 802. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to notice of personal hearing dated 07.12.2023 passed by the third respondent quash the same and consequently direct the respondents 2 to 4 to permit the petitioner to engage the services of a Private Lawyer / Chartered Accountant / Consultant of her choice to represent the Concern in the personal hearing in future.

For Petitioner : Mr.C.Muthusaravanan

For Respondents : Mr.N.Dilip Kumar
Standing Counsel for R.2 to R.4

ORDER

Heard both sides.

2.The writ petitioner is a proprietary concern. It had availed finance facilities from Tamilnad Mercantile Bank Limited. The accounts had become Non Performing Assets. SARFAESI proceedings have been initiated and the Bank has also filed recovery suit before the recovery tribunal. At this stage, show cause notice dated 16.09.2023 was issued calling upon the petitioner to represent as to why the Bank should not declare / report the petitioner's account as fraudulent. The petitioner submitted her explanation on 28.09.2023. Correspondence ensued between the parties. The petitioner is insisting on being furnished with some of the documents relied upon by the Bank. In-house inquiry was scheduled to be held on 13.12.2023. In the meanwhile, the present writ petition came to be filed.

3.The request made by the petitioner is two fold. She must be permitted to be represented by an auditor in the in-house enquiry ; She must be furnished with all the relied upon documents. Even though the learned standing counsel appearing for the Bank strongly questioned the very maintainability of the writ petition, I do not propose to go into the same considering the special facts and circumstances of this case. The first question that calls for consideration is whether the petitioner is entitled to be represented by an auditor in the in-house enquiry.

4.The learned Standing Counsel draws my attention to the decision of the Hon'ble Supreme Court reported in ***(2019) 6 SCC 787 (State Bank of India v. Jah Developers Private Limited & Others)***. The question that arose in the said case was whether while conducting inquiry under what is known as "master circular on wilful defaulters", the borrower is entitled to be represented by an advocate. The Hon'ble Supreme Court categorically held that there is no right to be represented by a lawyer in an in-house proceeding. That was because the revised circular dated 01.07.2015 did not provide for such representation. The learned Standing Counsel points out that this decision was followed by the Hon'ble Supreme Court in the subsequent decision reported in ***(2023) 6 SCC 1 (State Bank of India & Others Vs Rajesh Agarwal & Others)***. In the subsequent decision, the Hon'ble Supreme Court was called upon to answer if the principles of natural justice can be read into the master directions on frauds. The conclusions of the Hon'ble Supreme Court were set out in Paragraphs 97 and 98. They read as follows :

"97. We are unable to accept this argument of the borrowers in light of the fact that the borrowers and the third parties stand on a different footing because: (i) the borrowers are the main perpetrators of fraud, while the third parties are merely facilitators; and (ii) it is the borrowers who face the significant civil consequences stipulated under clauses 8.12.1 and 8.12.2, while the third party service providers are merely referred to the Indian Banks' Association which maintains a caution list of such service providers. However, this view does not affect our conclusions in view of the discussion in the preceding paragraphs.

E. Conclusion

98. The conclusions are summarized below:

98.1. No opportunity of being heard is required before an FIR is lodged and registered;

98.2. Classification of an account as fraud not only results in reporting the crime to investigating agencies, but also has other penal and civil consequences against the borrowers;

98.3. Debarring the borrowers from accessing institutional finance under Clause 8.12.1 of the Master Directions on Frauds results in serious civil consequences for the borrower;

98.4. Such a debarment under Clause 8.12.1 of the Master Directions on Frauds is akin to blacklisting the borrowers for being untrustworthy and unworthy of credit by banks. This Court has consistently held that an opportunity of hearing ought to be provided before a person is blacklisted;

98.5. The application of audi alteram partem cannot be impliedly excluded under the Master Directions on Frauds. In view of the time-frame contemplated under the Master Directions on Frauds as well as the nature of the procedure adopted, it is reasonably practicable for the lender banks to provide an opportunity of a hearing to the borrowers before classifying their account as fraud.

98.6 The principles of natural justice demand that the borrowers must be served a notice, given an opportunity to explain the conclusions of the forensic audit report, and be allowed to represent by the banks/JLF before their account is classified as fraud under the Master Directions on Frauds. In addition, the decision classifying the borrower's account as fraudulent must be made by a reasoned order.

98.7 Since the Master Directions on Frauds do not expressly provide an opportunity of hearing to the borrowers before classifying their account as fraud, audi alteram partem has to be read into the provisions of the directions to save them from the vice of arbitrariness."

As rightly pointed out by the learned Standing Counsel appearing for the Bank, even while holding that the principles of natural justice will have to be read into the provisions of the directions set out in the Master Directions on Frauds, the Hon'ble Supreme Court had nowhere held that the borrowers can be represented by an advocate or auditor.

5.The contours of natural justice will differ from case to case. We are concerned only with the manner in which the in-house inquiry is to be conducted. That would definitely not be the last word. The rights of the borrower are sufficiently protected. At the stage of holding the in-house inquiry, for the reasons which impelled the Hon'ble Supreme Court to hold that an advocate cannot represent the borrower, I hold that an auditor also cannot represent the borrower in the in-house inquiry. At the same time, some safeguards will have to be provided.

6.As rightly pointed out by the learned counsel appearing for the petitioner, the consequence of following categorisation of an account as fraudulent can be quite serious. Therefore, the inquiry proceedings shall not be concluded on a single day. The person conducting the enquiry will have to put the borrower on notice as to why the account is sought to be categorised as fraudulent. The petitioner shall be given reasonable breathing time so that she can go to her advisors / consultants / auditors and return probably with a written response. Except providing for this safeguard, the petitioner cannot be granted any other indulgence at the stage of in-house inquiry proceedings under Master Directions and Frauds.

7.It is of course well settled principle that whatever document is sought to be relied on by the authority concerned will have to be furnished to the noticee. In this case, the Bank is relying on the following reports:

a) Forensic Audit Report
b) Legal Opinion and Legal Audit Report
c) Valuation report obtained from the first sanction till the last
d) Internal Audit Reports

The bank shall make available the documents either in the form of pen drive or by mail. The petitioner shall be given 15 days' time from the date of furnishing such documents. The in-house inquiry shall be conducted in the manner as mentioned above. It is once again reiterated that the petitioner shall not be entitled to be represented by an auditor in the said inquiry.

8.This writ petition is disposed of accordingly. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

19.12.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
MGA

Note: Issue order copy on 09.01.2024.

To

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Department of Banking Regulation,
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G.R.SWAMINATHAN, J.

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